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No. 87-195

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANNA PENK, ET AL, Petitioners,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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September 10, 1987

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STATEMENT OF THE CASE

Although generally criticizing the petitioners' Statement of the Case, respondent does not and cannot disagree that its own statistical evidence showed significant disparity between men and women faculty members, differing only in the size of the disparity. For example, in comparing faculty members of the same education, experience and discipline, the variables used by petitioners showed a statewide $2,000 annual salary disparity while the variables used by respondent, when aggregated statewide, showed a $700 annual salary disparity. Both are statistically significant (Pl. Ex. 2782, Table 2, p. 26; p. 132). Neither side, however, analyzed the variables claimed by respondent to be the major reason for the disparity - quality of teaching, scholarship, and service - because no

data was available.

REASONS FOR GRANTING THE WRIT

I. Introduction.

Briefs in this case reflect differing views of the role of this Court.

Respondent claims that certiorari should not be granted to correct an allegedly harmless error and therefore attempts to divert attention from the legal errors in the Ninth Circuit opinion and focuses instead on support in the record for the district court findings.

Petitioners, on the other hand, emphasize the importance of this Court clarifying and unifying what is required to prove discrimination. Petitioners claim that when a prominent court of appeals, in a major case involving 2000 class members, makes legal errors in

direct conflict with four major decisions of this Court, these errors will prejudice future litigants throughout the nation, long after the facts in the unreported district court opinion are forgotten.

II. Contrary to Respondent's contention, the Ninth Circuit's finding of uncorrected, proven historical disparity is the equivalent of historical discrimination.

The Ninth Circuit holds that, "There is no substantial dispute that historical disparity exists," 816 F.2d at 461, further, that "The statistics may have proved that there were disparities in salaries and other terms of employment..." 816 F.2d at 468. Also, there is no dispute that the women faculty were not brought into "parity" with the male faculty. 816 F.2d at 461.

Petitioners argue that the Ninth

Circuit findings equal in law a finding of "discrimination" whether or not that magic word is used in the opinion. Respondent fails to acknowledge that the discrimination here, as in Bazemore, is the continuing violation of failing to correct the proven historic disparity.

III. The Ninth Circuit's legal errors in allocating the burdens of producing evidence are not cured by Respondent's references to the factual record in the District Court.

Despite respondent's attempts to divert attention, the Ninth Circuit decision does say,

> "The only relevant burden in a class action disparate treatment case, assuming that plaintiffs can avoid Rule 41 dismissal, is upon plaintiffs to prove the existence of discriminatory intent." 816 F.2d at 461.

This statement contradicts four major decisions of this Court: Teamsters

v. U.S., 431 U.S. 324 (1977); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); and Bazemore v. Friday, 106 S. Ct. 3000 (1986), all of which place the burden of production of evidence upon defendant once a prima facie case is established.

Respondent tries to avoid the impact of this obvious legal error in two ways.

First, of all, respondent's brief argues that,

> "To hold that any assumed defect in an appellate court's articulation of the burdens is a fatal error where the record overwhelmingly shows that respondent satisfied its burden of production would be a towering triumph of form over substance." (Resp. Br. 11)

The issue before this Court is not what the trial court did or did not do in its unreported opinion, but the conflict

between the rules of law announced by the Ninth Circuit and the decisions of this Court.[1]

Respondent asks to focus on substance, and the substantial responsibility of this Court is to clarify and unify the law. The burden of production of evidence by Title VII defendants should be the same throughout the nation.

Secondly, respondent refers to the Ninth's Circuit's statement that an error in allocating the burden of producing evidence does not matter. The Ninth

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[1]The District Court was legally incorrect when it held that petitioners "could not prevail" without accounting for quality of teaching, scholarship, and service (Cr 716, pp. 379-380) and the Ninth Circuit was legally in error in affirming this district court error. It was respondent rather than petitioners that had the burden of production upon respondent's claimed major reason for the disparity.

Circuit says,

> "Indeed, by the time a fully-tried class action disparate treatment case reaches appeal, we need not consider whether the parties carried their respective burdens at the appropriate stages unless prejudicial errors, infecting distinct legal rulings prevented a fair trial." 816 F.2d at 46.

This statement attempts to establish an unique legal proposition denying any appellate review to a critical legal error of the District court. Both respondent and the Ninth Circuit cite United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983), but that case does not support their position. Aikens holds that the McDonnell-Burdine presumption drops from the case after defendant "responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection." (460 U.S. at 714-715)

(emphasis added). There is nothing in Aikens which takes away the fundamental right of all litigants in the American system of justice to have a circuit court review of claimed legal errors of a trial court.

IV. Contrary to Respondent's contention, the Ninth Circuit did erroneously hold that Plaintiffs could not prove their case without statistical analysis of all variables.

Once again, respondent seeks to focus this Court's attention on the district court's analysis of the facts rather than the Ninth Circuit's misstatement of the law. Respondent's brief does not mention that the Ninth Circuit required petitioners rather than respondent to account statistically for quality of teaching, scholarship, and service, (816 F.2d at 264-465) areas which are not statistically measurable

since no data on these variables exists in the Oregon state system. Moreover, there is no evidence in the record to indicate that women would appear to be inferior teachers, scholars, or colleagues if such data were available. This issue is not, as respondent would have this Court believe, a matter of the weight of the evidence. The Ninth Circuit's decision is a contradiction of Bazemore which holds that Title VII plaintiffs can prevail without accounting for all measurable variables.

V. The Ninth Circuit uses an erroneous legal standard in measuring Petitioner's opportunity to prove pretext.

Here also, respondent stresses the conflicting evidence that was available to the district court rather than seeking to defend what the Ninth Circuit said. For example, if, as the Ninth Circuit

holds, key experts were excluded due to a "misunderstanding" and this was only "technically" a violation of scheduling orders, then that is not a sufficient justification to prejudice the credibility of plaintiffs' statistical proof.[2] Recognizing that evidentiary errors in a civil case are rarely alone grounds for certiorari, the importance here is that the Ninth Circuit failed to provide petitioners a fair opportunity to prove pretext, as required by Burdine.

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[2]Contrary to respondent, the mistake was that plaintiffs' attorney memorialized his understanding of the deadline for filing the names of the rebuttal experts orally in open court, rather than by filing a pleading. (CR 604, 638, RT 19256, CR 643, CR 649, RT 21512-21515, CR 651, 652, 668)

VI. Contrary to Respondent's argument, unlawful judicial deference to subjective academic decision-making flawed the Ninth Circuit's decision in this case.

Respondent argues that academic deference can arise in individual cases, but not in class cases where the issue is usually resolved statistically (Resp. Br. 15). Here, the Ninth Circuit required petitioners to model statistically the quality of teaching, scholarship, and service, even though no data existed. As the majority opinion points out in Namenwirth v. Univ. of Wisconsin System, 769 F.2d 1235, 1245 (7th Cir. 1985), this means that in academia, "the decision-maker is also the source of the qualifications."

Such deference to academic decision-making makes it nearly impossible for academic plaintiffs to win, except, perhaps, where there are

procedural defects. Kluger, Sex Discrimination in the Tenure System of American Colleges & Universities: The Judicial Response, 15 J. Law & Educ. 319, 339 (1986). Moreover, this deference is contrary to the intent of Congress when it included higher education in the Civil Rights Act. H.R. Rep. No. 238, 92d Cong. 2d Sess. (1971), reprinted in (1972) U.S. Code Cong. & Admin. News 2137, 2155.

National importance is shown by a study which indicates that there were 6000 charges pending with the Equal Employment Commission (EEOC) against higher education institutions. See La Noue, The Federal Judiciary and Academic Personnel Policy, 10 Pol'y Stud. J. 105, 106 (1981). No other Title VII plaintiffs have a similar burden.

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CONCLUSION

The petition for the writ of certiorari should be granted:

1. This case is a statewide class action of nationwide importance, which is shown by the unusual request of three national organizations, as amicus curiae, that certiorari be granted.

2. Although higher education has been subject to Title VII of the Civil Rights Act since 1972, this Court has never defined how discrimination is to be proven in academia.

3. The Ninth Circuit has contradicted major decisions of this Court in holding: (a) that "historical disparity" can excuse bringing women into "parity," (b) that a Title VII defendant has no burden of providing evidence of the major claimed reason for a proven disparity; (c) that plaintiffs, in order

to prevail, must account for all variables; and, (d) that the decision-making of academic employers is entitled to special deference.

4. These rulings, unless reviewed and reversed, place a nearly impossible burden upon future Title VII plaintiffs generally, and upon academic plaintiffs in particular, throughout the nation.

Respectfully submitted,

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